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In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, et al.,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Brief of Florida, Alabama, Colorado, Delaware, Hawaii, Illinois, Indiana, Louisiana, Maine, Michigan, Mississippi, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming In Support of Petitioners

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QUESTION PRESENTED

Can public employees sue their employers under the Petition Clause for adverse employment actions allegedly resulting from the employees' petitioning on matters of purely private concern?

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STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case due to its potential to define the boundaries of the First Amendment rights of their employees and because of its ability to impact employers' capacity to efficiently manage their workplaces.[1] States as public employers make a litany of personnel decisions every day, many involving private grievances of their employees. The Third Circuit's holding, that a public employee can bring a Petition Clause challenge on a matter that amounts to a private grievance, creates the potential for transforming relatively minor employment disputes into constitutional litigation in federal courts that will impede the ability of the States to efficiently administer their workplaces to better serve their citizens.

The Third Circuit's view of the scope of the Petition Clause is contrary to every court that has considered the issue. The interest of the Amici States is to ensure that the Petition Clause is read no more broadly than its neighbor, the Free Speech Clause, so that public sector employers can manage their offices without the fear that routine managerial decisions involving private grievances will result in federal constitutional claims.

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[1] State and local governments are often the largest employers in their jurisdictions. *See* Bureau of Labor Statistics, United States Dep't of Labor, *Career Guide to Industries, 2010-11 Edition, State & Local Gov't, Except Educ. & Health*, *available at* http://www.bls.gov/oco/cg/cgs042.htm ("Excluding education and hospitals, State and local governments employ 8.3 million workers, placing them amongst the largest employers in the economy.") (last visited Dec. 13, 2010).

SUMMARY OF ARGUMENT

The Third Circuit's holding that a public employee has a cognizable Petition Clause claim even where the underlying grievance does not involve an issue of public concern is faulty for several reasons.

First, the threshold inquiry as to whether a challenged restraint violates a public employee's First Amendment rights is whether the speech involves a matter of public concern. This Court's precedents have held that run-of-the-mill intra-office disputes have no First Amendment protections where no issues of public concern are implicated. *Connick v. Myers*, 461 U.S. 138, 143-48 (1983). Here, the underlying issue is an allegation that a public employer retaliated against an employee for filing a grievance about a wholly personal workplace matter. Ordinarily, this type of grievance — involving no issue of public concern — would not support a First Amendment claim of any kind by the employee. For the same reasons that free speech rights are not implicated when matters of private concern underlie grievances, Petition Clause rights are not implicated under similar circumstances.

Second, the Third Circuit erred in reasoning that the Petition Clause has broader application than other First Amendment rights in the employment context. This distinction has no textual basis in the constitution; it also goes against the principle that courts should not transform minor employment matters into constitutional disputes absent the presence of issues of public concern for which core First Amendment protections are intended.

Finally, as a practical matter, public employees have recourse under state and local laws to challenge workplace improprieties that fall short of matters of public concern. For instance, a litany of public sector whistleblower laws allow employees the opportunity to raise workplace concerns. These statutes generally do not require that the speech at issue involve a matter of public concern. In addition, many States and local governments have collective bargaining agreements that permit public sector employees to raise claims alleging they have suffered adverse personnel decisions because they filed grievances. Given the protections afforded, both by these laws and the First Amendment generally for matters of public concern, the expansion of the Petition Clause to create a new type of constitutional claim is misguided. The Third Circuit's decision should be reversed.

ARGUMENT

I. Retaliation Claims Under the Petition Clause on Matters that Amount to Personal Grievances Contravene this Court's Precedents and Undermine State and Local Laws Addressing These Common Workplace Disputes.

The Third Circuit's precedents,[2] which hold that a public employee may bring a retaliation claim under the Petition Clause when the allegedly protected speech involves a private workplace dispute, are outliers: ten other circuit courts have considered this issue and reached results contrary to the Third Circuit.[3] These decisions demonstrate that the Third Circuit's reasoning is inconsistent with this Court's Free Speech Clause jurisprudence, which holds that the threshold inquiry to determine whether a public employee's speech is insulated from employer

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[2] *See Brennan v. Norton*, 350 F.3d 399, 417 (3d Cir. 2003); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994); *see also Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

[3] The ten other circuit courts that have considered this question have held that a public employee's claim under the Petition Clause must involve a matter of public concern. *See Adair v. Charter Cnty. of Wayne*, 452 F.3d 482, 492 (6th Cir. 2006); *Kirby v. Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir. 2004); *Martin v. Del. Cnty.*, 179 F.3d 882, 887-89 (10th Cir. 1999); *Tang v. R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998); *Grigley v. Atlanta*, 136 F.3d 752, 756 (11th Cir. 1998); *Kendish v. Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann v. Mayor, Council, & Citizens of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Rathjen v. Litchfield*, 878 F.2d 836, 841 (5th Cir. 1989); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412 (7th Cir. 1988).

discipline involves determining whether the employee was speaking as a "citizen" about a matter of "public concern." *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The First Amendment does not insulate employee speech from disciplinary sanctions when speaking on subjects that relate exclusively to official job responsibilities. *See id.* at 424.

The Third Circuit distinguishes the Petition Clause from the Free Speech Clause on the grounds that the former has, historically, been understood to afford broader protections. *See San Filippo*, 30 F.3d at 442-443 (describing the common law origins of the Petition Clause and observing that it was more expansive in application and protections than the Free Speech Clause). The Third Circuit's approach, however, is flawed for two reasons: (1) this Court's First Amendment precedents do not recognize a broader scope of protection under the Petition Clause where the balance of employer-employee rights is at stake and private disputes are at issue; and (2) it disregards the wide swath of existing state and local protections for employees such as whistleblower statutes and collective bargaining agreements, which protect public sector employees from unjust discrimination based on the filing of private grievances. Given these flaws, no reason exists to uphold the addition of another layer of protection for private disputes under the Petition Clause.

A. Restraints on or discipline for public employees' workplace speech or petitioning are permissible where employees do not speak or petition as a "citizen" and their speech or petitioning implicates no matters of "public concern."

Public employees do not relinquish their First Amendment rights by accepting an offer to work in the public sector. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995). Nor are such rights unfettered. Rather, the limiting principle on the exercise of First Amendment rights is that public employees are not entitled to protections when the exercise of their rights involves a minor personal grievance between employer and employee. The threshold inquiry regarding whether a public employee's speech is insulated from discipline involves determining whether the speech at issue implicates a matter of "public concern." *See, e.g., San Diego v. Roe*, 543 U.S. 77, 82-83 (2004) (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)). As this Court has recognized, competing principles come into play when public employee's speech is balanced against the important interests of the government as an employer. This Court has sought to bridge these principles in a series of cases addressing the scope of First Amendment rights of public employees. These cases do not provide any principled basis to jettison the limiting principle that in determining the First Amendment rights of public employees, courts must scrutinize whether a matter of public concern was involved. The degree of protection afforded by the First Amendment should not turn on the manner in which the speech is denominated; petitioning activities should not be entitled to greater

constitutional protections than speech activities.

In *Connick v. Myers*, a public employee (Myers) opposed being transferred to a different division by her supervisor. 461 U.S. at 140. In response, Myers circulated a questionnaire in her office, asking fellow employees, among other things, how they would characterize office morale and whether the employees had any confidence in their supervisors. Myers was subsequently terminated, ostensibly because she had refused to accept her transfer. In analyzing Myers' First Amendment claim, this Court invoked the balancing test applied in *Pickering v. Board of Education*[4] to determine whether Myers' speech was protected from discipline. This Court noted that Myers' dispute with her employer did not implicate a matter of public concern simply because the

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[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968), involved a school teacher (Pickering) who sent a letter to the local newspaper challenging expenditures made by the local Board of Education. Pickering was critical of measures that had been enacted to increase revenue for the school district. These criticisms, as it turned out, were erroneous. He was dismissed from his teaching position on the basis that his letter threatened the effective functioning of the Board's administration of its schools. *Id.* at 564-66. Recognizing the competing interests of the Board, which was required to effectively manage its schools, and Pickering's right to speak out as a citizen on matters of public importance, this Court observed that a balance needed to be struck "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The court held, absent a showing that Pickering's false statements were "knowingly and recklessly made by him, . . . his right to speak to issues of public importance [could] not furnish the basis for his dismissal from public employment." *Id.* at 574.

questionnaire related to the internal dynamics of the District Attorney's Office. *Id.* at 143.

The Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147. The determination whether a matter was one of "public concern" is gauged from the "content, form, and context of a given statement, as revealed by the whole record." *Id.* The Court found that the questionnaire at issue related to a matter of personal concern: Myers' unwillingness to accept a transfer. The questionnaire was not of public concern because the questions did not imply that the District Attorney's Office had engaged in malfeasance. *Id.* at 148. In ruling against Myers, the Court noted that it must ensure "that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Id.* at 147.

Two limiting principles from *Connick* apply here as well. First, it can equally be said that when a public employee administratively files a grievance "not as a citizen upon a matter of public concern, but instead as an employee upon matters only of personal interest" the federal courts are not available "to review the wisdom of the personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147. Second, while this Court

must ensure that Petition Clause rights are not lost simply because an employee works for the government, no "grant of immunity for employee grievances" becomes available under the First Amendment simply because the employee works for the government. *Id.*

These principles were further discussed in *Garcetti v. Cebellos*, a case exploring the contours of a public employee's right to speak out against alleged improprieties by a public employer. 547 U.S. 410 (2006). Ceballos, who was employed with the Los Angeles District Attorney's Office, received information about a pending criminal case suggesting that information underlying an affidavit used to secure a search warrant was inaccurate. *Id.* at 413-14. Ceballos investigated the matter for himself and agreed that some of the information it contained was unreliable and relayed his concerns to his superiors. *Id.* at 414. He also drafted two separate memos for the benefit of his employer. The first described the flawed contents of the affidavit; the second described the conversation Ceballos had with the warrant affiant. *Id.* The office nevertheless proceeded with the case, and Ceballos was called by the defense to testify about his concerns with the affidavit's factual veracity. *Id.* at 414-15. Ceballos alleged that as a result he was subjected to a series of retaliatory measures by his employer. *Id.* at 415. He ultimately sued in federal court alleging that, among other claims, his First Amendment rights had been violated.

In finding no violation, this Court noted that Ceballos was simply speaking out about matters that related to his official job responsibilities, i.e., the proper disposition of a case. The Court observed that "[r]estricting speech that owes its existence to a public

employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 at 421-22. As such Ceballos' employers could permissibly discipline him if they believed his memo was needlessly inflammatory. *Id.* at 423. He was not speaking as a citizen on an issue of public concern; instead, he was simply speaking out about an issue that arose in the course of doing his job. Consequently, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

The Third Circuit's approach gives insufficient weight to the competing interests of public employers and employees by permitting an employee to bring a First Amendment retaliation claim even though the speech does not involve issues of public concern. Its interpretation turns on a perceived distinction between the First Amendment's Free Speech and Petition Clauses. *San Filippo*, 30 F.3d at 441-442. The Petition Clause, it is argued, provides broader First Amendment protections than the Free Speech Clause because the Petition Clause embraces claims that do not require that a matter of public concern be implicated. *Id.* at 442. So long as the public employee has availed him or herself of a formal grievance mechanism, that employee is insulated from employer retaliation and may bring a claim under the Petition Clause despite the grievance involving no matter of public concern. *Id.* This result is ill-considered and invites a host of problems.

From a public employer's perspective, the Third Circuit's view of the breadth of the Petition Clause raises serious management concerns. A real and

substantial risk exists that public employees will simply use formal grievance mechanisms as a pretext for a First Amendment claim against employers. Consider a simple, yet common, situation that occurs in the context of public employment. A public employee is aware that his employer is seeking to reduce staff for the upcoming fiscal year due to budget cuts. The employer has concomitantly announced plans to institute a comprehensive review and the review process will dictate staff reductions. Cognizant of his tenuous employment status, the employee preemptively files a non-frivolous (yet trivial) complaint to his superiors about an entirely personal matter of relevance only to the employee. Under *San Filippo* and its progeny, the employee has likely inoculated himself from any type of discipline, even when desperately necessitated, simply by making prospective use of internal grievance procedures. 30 F.3d at 441-42 ("[I]t would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious 'petition' . . . may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur."). Moreover, if the public employee suffered any adverse consequences subsequent to the review process, under the Third Circuit's reasoning the employee would have a cognizable retaliation claim under the Petition Clause. *Id.* (observing that a "non-sham" grievance or lawsuit was entitled to constitutional protection irrespective of the fact that the underlying matter did not involve an issue implicating public concern).

The Third Circuit's approach would lead to unacceptable results under a wide range of applications, including those underlying *Garcetti v.*

Ceballos. This Court held that because Ceballos' memorandum was drafted in the course of his job duties, he did not have a cognizable claim under the Free Speech clause for any discipline that occurred as a consequence of drafting it. However, under the Third Circuit's view, a different outcome could result if Ceballos had filed a claim under the Petition Clause. If Ceballos drafted the identical memorandum in the form of an internal or administrative grievance, and later suffered discipline as a result, he would have a cognizable constitutional claim. A similar claim brought under the Free Speech clause would result in a dissimilar outcome.

Indeed, the Third Circuit's approach, if applied to the fact patterns of the cases considered by the circuit courts who have ruled differently, would open a Pandora's Box of litigation over commonplace workplace grievances that have no place in federal court. *See, e.g., Tang v. R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998) (observing that Petition Clause claims simply involved "individual personal complaints about working conditions"); *Grigley v. Atlanta*, 136 F.3d 752, 755 (11th Cir. 1998) (rejecting public employee's claim that his testimony constituted protected speech under the Petition Clause, given the testimony concerned a private domestic altercation the employee had with a co-worker at his home); *Hoffmann v. Mayor, Councilmen, & Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) (recognizing that employee's claim was "wholly personal" because it involved "a grievance complaint pursuant to the City's personnel rules complaining of his dismissal"); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 419 (7th Cir. 1988) (public employee's lawsuit specifically related to the denial of a job promotion — the lawsuit was not attempting to vindicate greater rights).

The Third Circuit's approach elevates the form of the employee's grievance over the substance of whether it involves a matter of public concern. It creates simply too fine a line in distinguishing between the scope of the Petition Clause versus the Free Speech Clause in the employment context. The "public concern" test, albeit not perfect in its administration, provides a clearer line for both public employers and public employees. Public employers should be afforded the necessary leeway to make managerial decisions (and in necessary cases impose discipline) without fear of becoming embroiled in a federal constitutional dispute.

The Third Circuit's reasoning is problematic because it does not fully weigh the interests of public employers, who are distinct from private sector employers. This Court has been willing to allow speech restrictions instituted by public employers in the name of institutional efficiency. *See Garcetti*, 547 U.S. at 422 ("Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations."). Requiring that public employees' First Amendment claims be based on matters of public concern is a reasonable limiting principle on these types of legal claims.

From a public employer's perspective, the Third Circuit's approach creates the potential for routine managerial decisions having no public import to assume constitutional status. *Cf. id.* at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'") (quoting

Connick, 461 U.S. at 154). The Third Circuit's approach places federal courts in the position of weighing the propriety of managerial decisions whenever an employment grievance arises and a claim is filed.

The simple act of filing a lawsuit or grievance should not, in itself, confer a greater quantum of constitutional protection than other forms of speech. No reasoned basis exists to suggest that the Petition Clause was intended to assume a superior status vis-à-vis the Free Speech Clause in the employment context. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression."). Why should public employees who file an administrative "grievance" not have to establish — like others who exercise First Amendment rights — that their grievances satisfy the test for "matters of public concern"? Under the Third Circuit's approach, a court will not inquire into the context of the grievance, such as whether it involves an allegation of corruption, bribery, wide-spread racial discrimination, personal improprieties, biased hiring practices, fiscal mismanagement, or malfeasance. Instead, as long as the dispute is denominated as a "grievance" or the like, no inquiries need be made about the content or context of the dispute.

This reasoning is peculiar because it seems incongruous to hold that the manner in which the speech was styled predominates over the analysis of its substance. Consider that under the Third Circuit's paradigm, Ceballos' "memorandum" involving the proper disposition of a case and Myers'

"questionnaire" about office morale would be entitled to lesser constitutional protection than Mr. Guarnieri's "grievance" challenging a series of new job directives — without, it seems, any actual inquiry as to the substance of the underlying claims.

* * *

In summary, the Third Circuit's view contravenes this Court's prior precedents which have held that a matter of public concern must be at issue. *See Nat'l Treasury Emps. Union*, 513 U.S. at 466 (observing that a public employee was entitled to First Amendment protections "only when the employee spoke 'as a *citizen* upon matters of public concern rather than *as an employee* upon matters only of personal interest.'") (quoting *Connick*, 461 U.S. at 147). The Petition Clause should provide qualitatively no broader constitutional protection for public employees compared with other First Amendment protections. The First Amendment's Petition Clause should not serve as a vehicle to challenge all measures of employer-employee interactions. Said differently, every private workplace dispute that ultimately works to the disadvantage of the government employee does not constitute an impingement on the employee's First Amendment rights.

B. The Third Circuit's approach ignores the important protections of state and local "whistleblower" laws and collective bargaining agreements.

The Third Circuit's approach raises the concern that constitutionalizing Petition Clause claims for workplace grievances not involving matters of public

concern will thwart or marginalize (a) laws enacted by state and local governments that address public employees' private workplace grievances as well as (b) collective bargaining agreements that create and protect employees' rights. As this Court has noted, a "powerful network of legislative enactments — such as whistle-blower protection laws and labor codes — [are] available to those who seek to expose wrongdoing." *Garcetti*, 547 U.S. at 425. The Third Circuit's view, that employers will have the ability to suppress the petitioning activities of employees absent broader First Amendment protections, is unpersuasive in light of these laws. Moreover, the recognition of a federal Petition Clause claim creates an incentive to bypass these state and local protections in favor of a federal lawsuit.

1. The efficacy of state whistleblower laws and anti-retaliation provisions may be undermined by Petition Clause retaliation claims related to personal matters.

Every State affords its workers, whether in the private or public sector, some form of protection from retaliation for exposing employer misconduct.[5] Characterized as "whistleblower laws," these statutes vary in their breadth and applicability.[6]

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[5] *See* Elletta Sangrey Callahan & Terry Morehead, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99, 100 (2000) ("Whistleblower protection statutes have been enacted in each of the fifty states.")

[6] Callahan & Morehead, *supra* note 5, at 132-175, Appx. A (identifying the wide variety of whistleblower protections available throughout the United States).

An example is the Florida Public Sector Whistleblower Act ("Florida Whistleblower Act"),[7] whose legislative intent "is to prevent retaliatory action against employees who disclose misconduct on the part of public officials." *Fla. Dep't of Transp. v. Fla. Comm'n on Human Relations*, 842 So. 2d 253, 256 (Fla. Dist. Ct. App. 2003).[8] The Act is remedial in nature and "construed liberally in favor of granting access to the remedy." *Martin Cnty. v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992). It applies to "any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university." Fla. Stat. § 112.3187(3)(a).

The Florida Whistleblower Act states that "[a]n agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section." Fla. Stat. § 112.3187(4)(a).[9] It protects disclosures of

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[7] Florida has a Private Sector Whistleblower Act, which is similar to the Florida Public Sector Whistleblower Act in many respects. *See* Fla. Stat. §§ 448.101-448.105.

[8] The Florida Public Sector Whistleblower Act prohibits retaliation against any individual "who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee." Fla. Stat. § 112.3187(2).

[9] Under section 112.3187(3)(c) an "adverse personnel action" is characterized as: "[T]he discharge, suspension, transfer, or (Continued ...)

information including: "Any violation or suspected violation of federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety or welfare" as well as "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor." *Id.* §§ 112.3187(5)(a)-(b).

In many respects the Florida Whistleblower Act, and analogous state whistleblower laws, provide broader protections to public employees than are available under the First Amendment. *See Stone v. Everglades City, Fla.*, 2007 WL 1247979, at *3 (M.D. Fla. April 30, 2007) ("Florida's Whistle-blower's Act is thus not limited to speech protected by the First Amendment."). The Florida Whistleblower Act, for example, does not mandate that the public employee's grievance involve a matter of public concern. *See Rosa v. Dep't of Children & Families*, 915 So. 2d 210, 212 (Fla. Dist. Ct. App. 2005) (conceding that employee's allegations could reasonably be considered a personal "rant" against an employer or allegation of misfeasance, but that this issue was for a jury to decide).

To have a colorable cause of action under the Florida Whistleblower Act, no requirement exists that

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demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by an agency or independent contractor."

the public employee speak as a "citizen" on a newsworthy matter. *See, e.g., Walker v. Dep't of Veterans Affairs*, 925 So. 2d 1149 (Fla. Dist Ct. App. 2006) (employee alleged that he was retaliated against for raising concerns about the safety of a van he was driving). Instead, a state employee has sixty days within which to file a formal complaint alleging that he was discharged, disciplined or suffered an adverse personnel decision as a consequence of engaging in conduct protected under the statute. *See* Fla. Stat. § 112.31895(1)(a). The statute requires that to have a colorable claim, the complainant must satisfy the following criteria: "'(1) prior to [the adverse personnel decision] the employee made a disclosure protected by the statute; 2) the employee was [subjected to an adverse personnel decision]; and 3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.'" *Walker*, 925 So. 2d at 1150 (quoting *Fla. Dep't of Transp.*, 842 So. 2d at 255). Following receipt of the complaint, the Florida Commission on Human Relations bears the responsibility for investigating the allegation of reprisal. Fla. Stat. § 112.31895(2)(a).

The Florida Whistleblower Act typifies efforts by other state legislatures in the last several decades to protect public employees from retaliatory consequences for disclosures of governmental wrongdoing, waste, or abuse.[10] These States allow

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[10] *See, e.g.*, Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees who Disclose the Wrongdoing of Employers?*, 38 S.D. L. Rev. 316, 319-327 (1993) (discussing the evolution of state and federal whistleblower protection laws since the 1960s). *See also* Callahan & Morehead, *supra* note 5, at 132-

(Continued ...)

employees to give voice to concerns about matters that may impact the proper functioning of the workplace, thereby improving governmental operations. States have different degrees of protection for their public sector employees. For example, some provide protections for all public sector employees.[11] Others provide protections for both private and public employees and/or employers.[12] State whistleblower laws have their own administrative requirements regarding the exhaustion of remedies. For example, an employee in Connecticut is required to initially file a whistleblower complaint with the Auditor of Public Accounts whereas an employee in New Jersey is first required to provide notice of wrongdoing to the appropriate supervisor to address the underlying matter in an expeditious manner. *Compare* Conn. Gen. Stat § 4-61dd (discussing Connecticut's administrative requirements), *with* N.J. Stat. Ann.

75, Appx. A (enumerating state whistleblower laws), Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 Admin. L. Rev. 581, 582 n.3 (1999) (listing hundreds of state statutes protecting whistleblowers).

[11] *See Garcetti*, 547 U.S. at 440 n.8 (Souter, J., dissenting) (citing Del. Code Ann. tit. 29, § 5115 (2003); Fla. Stat. § 112.3187 (2003); Haw. Rev. Stat. § 378-61 (1993); Ky. Rev. Stat. Ann. § 61.101 (West 2005); Mass. Gen. Laws ch. 149, § 185 (West 2004); Nev. Rev. Stat. § 281.611 (2003); N.H. Rev. Stat. Ann. § 275-E:1 (Supp. 2005); Ohio Rev. Code Ann. § 4113.51 (Lexis 2001); Tenn. Code Ann. § 50-1-304 (2005)).

[12] *See, e.g.*, Conn. Gen. Stat. §§ 31-51m, 4-61dd; Fla. Stat. §§ 112.3187, 448.102; Haw. Rev. Stat. § 378-61; Me. Rev. Stat. tit. 5, § 4572-A; Minn. Stat. § 181.931; Neb. Rev. Stat. §§ 48-1102, 48-1114; N.H. Rev. Stat. Ann. § 275-E:2; N.J. Stat. Ann. § 34:19-3; N.D. Cent. Code § 34-01-20; Ohio Rev. Code Ann. §§ 4113.52(A)(1), 124.341; Or. Rev. Stat. § 659A.200; R.I. Gen. Laws § 28-50-4; Tenn. Code Ann. § 50-1-304.

§ 34:19-1 (outlining New Jersey's administrative requirements before a complaint can be filed with a public body).

The Third Circuit's approach has the potential to undermine these public sector whistleblower laws, which strike a workable balance between rights of public employees to expose workplace misconduct and rights of public sector employers to administer services efficiently. Consequently, federal courts should not be needlessly forced, under an overly broad view of the scope of the Petition Clause, into resolving intra-office disputes that amount to private grievances.

By allowing public employees to raise First Amendment claims under the Petition Clause without regard to the content of the speech, the Third Circuit undermines the incentive for individuals to first use applicable state whistleblower statutes. The Third Circuit holds that as long as a public employee has filed a non-frivolous grievance or complaint, that employee may have a cognizable retaliation claim under the Petition Clause. This belief seems predicated on the concern that, without broad protections, public employees will not have the ability to challenge employer misconduct. This approach, however, has unintended consequences. For example, any time a public employee files an administrative grievance should an employer assume that an entirely unrelated adverse administrative or disciplinary action is never permissible? If an employee believes he will automatically have a federal forum to raise concerns about alleged workplace improprieties, why bother to pursue relief under whistleblower statutes? And, if the Petition Clause provides duplicative

protections with state whistleblower laws, what need exists for the latter?

Public sector whistleblower laws exist, in many respects, to provide public employees with a mechanism to expose misconduct — whether a public concern or not — without the fear of incurring an adverse personnel decision. By eliminating the requirement that a public employee's grievance must involve a matter of public concern, the Third Circuit's approach undermines state whistleblower laws and potentially makes federal courts the first avenue for relief, versus the last, for matters that do not involve public concerns.

2. The efficacy of collective bargaining agreements, labor laws, and related common law doctrines may be undermined by Petition Clause retaliation claims related to personal matters.

Public employees, particularly those who work in state government, have a raft of contractual protections that safeguard them from retaliation for engaging in protected activity. A non-exhaustive listing of state statutes evidences that a majority of States permit public employees to engage in collective bargaining with their employers regarding matters including filing formal grievances or complaints without fear of discharge or discrimination from the employer.[13]

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[13] *See, e.g.*, Alaska Stat. § 23.40.110(a)(4); Cal. Gov't Code § 3519(a); Conn. Gen. Stat. § 5-272(a)(5); Del. Code Ann. tit. 19, § 1307(a)(4); D.C. Code Ann. § 1-617.04(a)(4); Fla. Stat. § 447.501(1)(d); Haw. Rev. Stat. § 89-13; 5 Ill. Comp. Stat. (Continued ...)

These protections derive from collective bargaining agreements, which allow employees to engage in certain protected activities without fear that their activities will lead to dismissal. Under most collective bargaining agreements, or similar statutory provisions, public employees are permitted to file grievances related to their employment conditions. Consequently, if an employer has undertaken conduct that is alleged to violate the terms of these collective agreements, employees (or their representatives) may seek redress by filing a grievance. Indeed, Mr. Guarnieri took advantage of grievance mechanisms and prevailed *twice*. His experience is a good example of the efficacy of these types of collective bargaining agreements.

This Court has cautioned that the protections accorded by the Free Speech Clause "do[ ] not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. The Third Circuit's approach, however, would lead to this result. Here, a simple dispute involving a series of additional job responsibilities has

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315/10(a)(3); Iowa Code § 20.10(2)(d); Kan. Stat. Ann. § 75-4333(b)(4); Me. Rev. Stat. tit. 26, § 979-C(1)(D); Md. Code Ann. State Pers. & Pens. § 3-306(a)(5); Mass. Gen. Laws ch. 150E, § 10(a)(4); Mich. Comp. Laws § 423.209; Minn. Stat. § 179A.13(2)(4); Mont. Code Ann. § 39-31-401(4); Neb. Rev. Stat. § 81-1386(2)(d); N.H. Rev. Stat. Ann. § 273-A:5(I)(d); N.J. Stat. Ann. § 34:13A-5.4(a)(4); N.M. Stat. Ann. § 10-7E-19; N.Y. Civ. Serv. Law § 209-a(1)(c); Ohio Rev. Code Ann. § 4117.11(A)(4); Or. Rev. Stat. § 243.672(1)(d); 43 Pa. Cons. Stat. § 1101.1201(a)(4); R.I. Gen. Laws § 28-7-13(8); S.D. Codified Laws § 3-18-3.1(4); Vt. Stat. Ann. tit. 3, § 961(4); Wash. Rev. Code § 41.56.140; Wis. Stat. § 111.06(1)(h).

taken on constitutional dimensions. *Cf. id.* at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices . . . ."). The Third Circuit's approach effectively undermines public sector collective bargaining agreements, which already prohibit employers from discriminating against employees for filing a grievance or complaint.

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Federal courts should not be forced to referee minor workplace disputes that are better suited for disposition under state whistleblower laws or collective bargaining protections. Was overtime pay improperly denied? Was an employee disciplined as a consequence of refusing to accept a job transfer? Were assigned work duties beyond the purview of contractual obligations? Was the time allotted for lunch insufficient? Each of these may be a legitimate basis for filing a personal grievance or pursuing a state remedy; but each should not be a federal claim absent a showing of public concern. Collective bargaining agreements, labor laws, and whistleblower statutes — not the First Amendment's Petition Clause — are better suited to deal with these issues, as well as allegations of employer retaliation relating to wholly personal issues. The Third Circuit's approach minimizes the importance of these legal protections. Reversing the Third Circuit will not reduce the ability of public employees to vindicate the exercise of First Amendment rights on matters of public concern; nor will it leave public employees without redress. Rather, reversal would simply bring the Third Circuit into accord with the ten circuits that have considered this

issue, and give breathing space to the state and local laws that permit public sector employees to pursue grievances and remedies for personal employment matters in the workplace.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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